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File No. 51059.00048

May 6, 2013

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: In re Media Bureau and Consumer and Governmental Affairs Bureau  
Seek Comment on Second VPAAC Report: User Interfaces, and Video  
Programming Guides and Menus, MB Docket No. 12-108

Dear Ms Dortch:

On behalf of Montgomery County, Maryland's Office of Cable and Broadband Services, the undersigned submits this *ex parte* letter in the above-referenced proceeding.

On May 3, 2013, Mitsuko Herrera, Cable & Broadband Communications Administrator of the Office of Cable and Broadband Services, spoke with Dave Grimaldi, Chief of Staff and Media Legal Advisor to Commissioner Clyburn, to strongly urge the Commission to include a rule in its coming Notice of Proposed Rulemaking to implement Sections 204 and 205 of the of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") requiring those user interfaces and video programming guides and menus which display channel and program information to include, *for all channels*, high level channel and program descriptions and titles, as well as a symbol identifying the programs with accessibility options (captioning and video description).

Ms. Herrera expressed the County's view that requiring this level of information to be provided in real time for all channels will ensure that users have sufficient information to clearly identify the accessibility options that are available for a program prior to viewing, and that the Commission has direct authority under the CVAA, or alternatively could exercise ancillary authority to require that cable operators include high level channel and program descriptions and titles, as well as a symbol identifying the programs with accessibility options (captioning and video description) on user interfaces and video programming guides and menus.



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The attached briefing document entitled "FCC Statutory Authority Under Communications and Video Accessibility Act (CVAA) to Require Programming and Accessibility Information to Appear on User Interfaces and Video Programming Guides and Menus" provides additional background on the points discussed in this meeting.

Sincerely,

A handwritten signature in purple ink, appearing to read 'Gail A. Karish'.

Gail A. Karish  
BEST BEST & KRIEGER LLP

Attachment

cc: Lyle Elder, Legal Advisor, Office of Chairman Genachowski  
Dave Grimaldi, Chief of Staff and Media Advisor, Office of Commissioner Clyburn  
Alex Hoehn-Saric, Policy Director, Office of Commissioner Rosenworcel  
Priscilla Delgado Argeris, Legal Advisor, Office of Commissioner Rosenworcel  
Matthew Berry, Chief of Staff, Office of Commissioner Pai  
Erin McGrath, Legal Advisor, Office of Commissioner McDowell  
Karen Peltz Strauss, Deputy Chief, Office of Consumer Information Bureau  
Holly Saurer, Legal Advisor, Media Bureau  
John Norton, Legal Advisor, Media Bureau  
Susan Aaron, Attorney Advisor, Office of General Counsel

**FCC STATUTORY AUTHORITY UNDER COMMUNICATIONS AND VIDEO  
ACCESSIBILITY ACT (CVAA) TO REQUIRE PROGRAMMING AND  
ACCESSIBILITY INFORMATION TO APPEAR ON USER INTERFACES AND VIDEO  
PROGRAMMING GUIDES AND MENUS**

*Introduction:* The Commission is currently developing a Notice of Proposed Rulemaking to implement Sections 204 and 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). These provisions direct the Commission to make user interfaces and menus on digital video programming apparatuses, and video programming guides and menus provided on navigation devices accessible to people who are blind or visually impaired. The County’s numerous public access, educational and governmental (“PEG”) channels generate significant amounts of video programming most of which is closed captioned. However, not all cable providers carry the names of these PEG channels and information describing the PEG programs on their programming guides, although they do carry this information for other channels. Instead, the PEG programming is listed as a random multi-hour block of “local programming” or something equally generic.

The County urges the Commission to adopt a requirement that user interfaces and video programming guides and menus which display channel and program information be required to include, *for all channels*, high level channel and program descriptions and titles, as well as a symbol identifying the programs with accessibility options (closed captioning and video description). Such a requirement would (i) address the need for video programming to indicate at the outset whether it comes with accessibility options such as closed captions. This need has been identified by both the technical committee advising the Commission on implementation of the CVAA, and consumer groups representing the disability community; and (ii) ensure that users are provided with the baseline minimum amount of program information required to make the actual selection of video programming with accessibility options possible.

The County believes the CVAA provides the Commission with ample authority to require user interfaces and video programming guides or menus to identify *both* the video programming through high level channel and program descriptions and titles, and whether the video programming has accessibility options. The County believes the Commission has direct authority under the CVAA to implement this requirement. In the alternative, the County believes that Commission also has sufficient ancillary authority to implement this requirement, consistent with the Commission's previous order describing the scope of its ancillary authority to implement accessibility requirements under 47 USC §255. The Commission exercised its ancillary authority in the past after determining that it could not “carry out meaningfully accessibility requirements” under 47 USC §255, or “fully achieve that objective [of making telecommunications services accessible] without this limited use of [its] ancillary jurisdiction” to require certain non-telecommunications services to be made accessible.<sup>1</sup> Likewise, the County respectfully suggests that the Commission cannot meaningfully implement the CVAA's objective to make user interfaces, and video programming guides and menus accessible without requiring that cable operators make channel names, program descriptions and accessibility identifiers (closed captioning, video description) viewable on their user interfaces, and video programming

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<sup>1</sup> See *infra* discussion under heading “Legal Authority”.

guides and menus for all channels, including local PEG channels, and that the Commission could impose these requirements through the limited exercise of the Commission's ancillary authority.

Background: Congress long ago recognized that industry could not be relied upon to voluntarily add closed captioning to all of its programming and in the *Telecommunications Act of 1996* mandated that the Commission implement rules imposing such requirements on a broad array of programming.<sup>2</sup> As a result, the Commission adopted rules that require certain video programming to be closed captioned.<sup>3</sup>

More recently, Congress recognized that accessibility tools needed to be updated to address new technologies and to allow persons with disabilities to better access video programming. To achieve these goals, Congress enacted the CVAA.

Sections 204 and 205 of the CVAA<sup>4</sup> direct the Commission to make user interfaces on digital video programming apparatus, and video programming guides and menus provided on navigation devices accessible to people who are blind or visually impaired. Congress also directed the Commission to appoint an advisory committee of technical experts from industry and disability groups to assist it with its work. The Commission appointed a committee known as the Video Programming Access Advisory Committee or VPAAC to perform this role.

Among other things, pursuant to CVAA Subsections 201(e)(2)(F) and (H), the VPAAC was required to make the following recommendations:

(F) With respect to user interfaces, a recommendation for the standards, protocols, and procedures used *to enable the functions of apparatus designed to receive or display video programming transmitted simultaneously with sound* (including apparatus designed to receive or display video programming transmitted by means of services using Internet protocol) *to be accessible to and usable by individuals with disabilities*.

(H) With respect to video programming guides and menus, a recommendation for the standards, protocols, and procedures used *to enable video programming information and selection provided by means of a navigation device, guide, or menu to be accessible in real-time by individuals who are blind or visually impaired*.

VPAAC Report: The VPAAC identified “Channel / Program Selection” and “Display Channel / Program Information” among the essential functions covered by CVAA,<sup>5</sup> and

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<sup>2</sup> See 47 U.S.C. § 613 Video Programming Accessibility, and H.R. Report 104-204, 104th Cong., 1st Sess. at 113-14 (1995), (“The Committee recognizes that there has been a significant increase in the amount of programming that has been closed captioned since the passage of the Television Decoder Circuitry Act of 1990. In particular, many network programs aired during prime time are captioned. Nevertheless, the Committee is concerned that video programming through all delivery systems should be accessible, and that new products and services offered using the information networks of the future should be accessible to people with disabilities.”)

<sup>3</sup> See 47 C.F.R. § 79.1.

<sup>4</sup> 47 U.S.C. § 303(aa)(1) & (2) (requirement for digital apparatus); 47 U.S.C. § 303(bb)(1) (requirement for navigation devices).

<sup>5</sup> Second Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: User Interfaces, and Video Programming Guides and Menus (April 9, 2012) (“Report”) at 8.

commented that devices with this function may provide high level channel or program descriptions and titles as well as more detailed channel or program information such as plot descriptions, actors, and accessibility options (e.g. presence of closed captioning or video description).<sup>6</sup>

Concerning the need for real-time program-specific information about the availability of accessibility options, the VPAAC identified a common problem faced by many users dependent on accessibility functions:

Often it is impossible to determine the accessibility of a program (whether it provides captioning or video description) until after watching a set of previews and/or advertisements. This can lead to frustration on the part of users dependent on such capabilities as they attempt to locate programming that meets their accessibility needs.<sup>7</sup>

The VPAAC also identified a solution to this problem:

A more accessible and usable solution for deaf or hard of hearing and blind or vision impaired users would ***provide clear identification of the accessibility options that are available for a program prior to viewing, such as labeling the program as having captions and/or video description within the mechanism used to display channel / program information.***<sup>8</sup>

Consumer Groups commenting on the Report supported the VPAAC's position that a solution was needed to ensure that users are made aware of their accessibility options for a program *prior* to viewing the program. To that end, the Consumer Groups stated:

The Consumer Groups encourage the Commission to propose requiring that there be a mechanism for users who are deaf or hard of hearing to visually identify whether a program is accessible or not before starting the program. In order for this mechanism to be clear and effective, we encourage the Commission to require video programming distributors to identify their closed captioned programs using a universal symbol for closed captioning.<sup>9</sup>

The most logical place for such a symbol to appear would be where the VPAAC identified labeling should appear in its Report, that is "labeling the program as having captions and/or video description within the mechanism used to display channel / program information."<sup>10</sup>

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<sup>6</sup> Report at 11.

<sup>7</sup> Report at 18 (emphasis added).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *In re Media Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Second VPAAC Report: User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Comments of The National Association of the Deaf (NAD), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Association of Late-Deafened Adults, Inc. (ALDA), Hearing Loss Association of America (HLAA) and the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) (filed June 8, 2012) at 5 (citations omitted).

<sup>10</sup> See *supra* note 8.

*Need for Program Description Plus Accessibility Label*: Implicit in the above discussion about accessibility labeling is the idea that there is something being labeled. That is, the labeling solution identified by VPAAC and endorsed by the Consumer Groups will only work successfully to alleviate users' frustration over the inability to locate and select video programming that meets their accessibility needs prior to viewing *if* the accessibility label is attached to high level program descriptions or titles. Put another way, users need to know both what the program is and whether it is accessible to make meaningful video program choices.

Although many user interfaces, guides and menus include high level program descriptions or titles, they do not always do so on a consistent basis for all channels. For example, a total of 11 public access, educational and governmental (PEG) channels appear on cable systems in Montgomery County but one operator, Verizon, has refused to carry the names of these PEG channels and information describing the programs carried on the PEG channels on its programming guides. Instead, the PEG programming is listed as a random multi-hour block of "local programming" or something equally generic. Adding an accessibility label to this generic description would not alleviate user frustrations. Users would still not know what program is accessible without viewing it. In instances where only some of the PEG channel programming in the random multi-hour block is accessible, a generic title with an accessibility label may actually misinform users. Thus, the County believes it is imperative that user interfaces and video programming guides and menus which display channel and program information include, *for all channels*, both high level channel and program descriptions and titles, as well as a symbol identifying the programs with accessibility options (closed captioning and video description).

*Legal Authority*: As noted earlier, Sections 204 and 205 of the CVAA direct the Commission to make user interfaces and video programming guides and menus on devices used for the display or selection of video programming accessible to people with disabilities. In the County's view, the suggested two-part rules fit squarely within the Commission's authority. It would be consistent with the Commission's mandate to implement the CVAA based on the expert advice and recommendations of its advisory committee and the community of users that depend on these video accessibility functions, and with the exercise of its authority as an expert agency to define ambiguous terms in the CVAA.<sup>11</sup>

The CVAA does not define the key terms such as "user interface", "video programming guides and menus", and "video programming information", nor does it define their "functions" that must be made accessible. As discussed earlier, the VPAAC did recommend a set of functions "considered essential to the video consumption experience,"<sup>12</sup> and these included both "Channel / Program Selection" and "Display Channel / Program Information". In discussing these functions, the VPAAC noted that "on-screen guides and menus used to browse available A/V content can take many different forms"<sup>13</sup> and that the amount of program information provided can vary widely in level of detail.<sup>14</sup> It would be well within the Commission's

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<sup>11</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>12</sup> Report at 8.

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.* at 11.

authority to address these ambiguities in the terms employed by the statute by defining what these terms mean. For example, it would be reasonable to interpret the term “video programming information” to include information such as the title of a program and whether it is closed captioned, and to interpret a “video programming guide” intended to “enable video programming information and selection” to be one that contains a minimum level of information about the programming that can be selected through the use of the guide.

But even if the Commission were to take the view that the CVAA does not give it sufficient *direct* jurisdiction to impose these program description and labeling requirements as accessibility obligations, the County believes it is well within the Commission’s *ancillary* jurisdiction to impose them. Jurisdiction may be asserted by the Commission when it is “reasonably ancillary to the effective performance of [its] various responsibilities.”<sup>15</sup>

This would not be the first time the Commission exercised its ancillary authority to effectively implement an accessibility statute. More than a dozen years ago, when the Commission adopted rules to implement Section 255 of the *Communications Act*, 47 USC § 255, to make telecommunications services accessible, the Commission also exercised its ancillary authority to include within the accessibility requirements two non-telecommunications services – voicemail and interactive menus.<sup>16</sup> The Commission exercised its ancillary authority to include these features because it was convinced that these two non-telecommunications services were “critical to making telecommunications accessible and usable by people with disabilities”<sup>17</sup> and because, having been charged by Congress to ensure that telecommunications services and equipment are accessible and usable by persons with disabilities, the Commission could not “carry out meaningfully the accessibility requirements”<sup>18</sup> or “fully achieve that objective without this limited use of [its] ancillary jurisdiction.”<sup>19</sup> The Commission found that “these two discrete information services are both so integral to the use of telecommunications services today that, if inaccessible and unusable, the underlying telecommunications services that sections 255 and 251(a)(2) have sought to make available will not be accessible to persons with disabilities in a meaningful way.”<sup>20</sup> In that circumstance, the Commission used its discretion “so as to ensure that the implementation of section 255 is not thwarted,”<sup>21</sup> based on its view that “inaccessible and unusable voicemail and interactive menus operate in a manner that can render the telecommunications service itself inaccessible and unusable.”<sup>22</sup> In the course of exercising its ancillary jurisdiction, the Commission defined the term “interactive menu.”<sup>23</sup> More recently, in

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<sup>15</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

<sup>16</sup> See 47 CFR Part 7.

<sup>17</sup> *In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities* (WT Docket No. 96-198) Report And Order And Further Notice Of Inquiry, 16 FCC Rcd 6417, 6455 (1999), ¶ 93.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 16 FCC Rcd at 6458, ¶ 100.

<sup>21</sup> 16 FCC Rcd at 6460, ¶ 103.

<sup>22</sup> 16 FCC Rcd at 6461, ¶ 107.

<sup>23</sup> 47 CFR § 7.3(e).

2007, the Commission again exercised its ancillary authority to extend the same telecommunications accessibility requirements (including voicemail and interactive menus) to voice over internet protocol (VOIP) services.<sup>24</sup>

By contrast to this earlier legislation, in the CVAA, Congress has already decided that user interfaces and video programming guides and menus are essential to making video services accessible and it has given the Commission direct responsibility to make them accessible. The suggested two-part rule simply ensures that this responsibility is performed meaningfully and in a manner that fully achieves Congress' accessibility objective by requiring essential program and accessibility information to appear on the user interfaces and video programming guides and menus. These suggested rules would also respect the *limits* on Commission authority under Sections 204 and 205 by *not* specifying the technical standards, protocols, procedures, and other technical requirements for meeting this requirement.

Thus, for all of the above reasons, the County urges the Commission to include within its proposed rules implementing the VPAAC's recommendations this simple and effective two-part solution for user interfaces and program guides and menus (*i.e.*, program description plus accessibility label) to fulfill its mandate under the CVAA to make user interfaces and program guides and menus truly accessible.

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<sup>24</sup> *In the Matters of IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WC Docket No. 04-36; WT Docket No. 96-198; CG Docket No. 03-123; CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275 (2007).